**STATE OF MICHIGAN**

**IN THE MICHIGAN SUPREME COURT**

**On Appeal From The Court Of Appeals**
**The Honorable Patrick M. Meter, The Honorable**
**Karen M. Fort Hood, And The Honorable Bill Schuette, Presiding**

**THE GREATER BIBLE WAY TEMPLE OF JACKSON**, a Michigan ecclesiastical corporation,

Plaintiff/Appellee,

vs.

**CITY OF JACKSON, JACKSON PLANNING COMMISSION, and JACKSON CITY COUNCIL**

Defendants/Appellants.
_____/

**Supreme Court No. 130194**
Court of Appeal No. 250863
Lower Court No. 01-003614-AS

SECREST WARDLE

# BRIEF OF APPELLANT CITY OF JACKSON

**ORAL ARGUMENT REQUESTED**

**Respectfully submitted,**


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## STATEMENT OF BASIS OF JURISDICTION

This Court granted Leave to Appeal to the City of Jackson by Order dated May 4, 2006, and consolidated this case with *Greater Bible Way Temple v City of Jackson*, Supreme Court Case No.130196.

## STATEMENT OF QUESTIONS INVOLVED

I. **Plaintiff GBW asked the City of Jackson to enact legislation materially altering an established single-family residential zoning district by re-classifying several subdivision lots owned by the GBW in the middle of a stable single-family neighborhood to a multiple-family classification, to allow for construction of an apartment complex. The GBW did not propose a specific use or development. On the basis of long-standing legislative policy in the City, and considering the reliance of the GBW's neighbors on the continuation of the existing single-family zoning, the City Council determined to keep the single- family residential district in tact.** ***Was this legislative policy decision by the City an "individualized assessment" of a land use under RLUIPA, and therefore subject to "compelling interest" scrutiny*****?**

The Circuit Court said "Yes."
The Court of Appeals said "Yes."
Appellee says "Yes."
Appellant City says "No."
This Court should say "No."

II. **Plaintiff GBW alleges that the City's decision not to enact legislation changing the zoning of the GBW's property from a single-family classification to a multiple-family classification resulted in a substantial burden on the GBW's religious exercise, because it prevented the GBW from establishing a housing project on the property.** ***If an ordinance is facially neutral, and imposes no greater burden on a religious user than it would on a non-religious user, can the denial rise to the level of a substantial burden under RLUIPA*****?**

The Circuit Court said "Yes."
The Court of Appeals said "Yes."
Appellee says "Yes."
Appellant City says "No."
This Court should say "No."

III. **The City's decision not to enact legislation changing the single-family classification of the GBW's property to a multiple-family classification furthered the City's interests in protecting a stable neighborhood and fostering single-family home ownership in established neighborhoods.** ***Is the protection of existing neighborhoods a legitimate zoning and planning interest and a compelling governmental interest under RLUIPA*****?**

The Circuit Court said "No."
The Court of Appeals said "No."
Appellee says "No."
Appellant City says "Yes."
This Court should say "Yes."

IV. **The lower courts concluded that an "individualized assessment" includes the legislative act of amending a zoning district map, and that the denial of a rezoning to build an apartment complex on subdivision lots in the middle of a single-family residential neighborhood is a "substantial burden."** ***When read that broadly, is RLUIPA unconstitutional because it exceeds the scope of Section 5 of the Fourteenth Amendment and because it constitutes the establishment of religion*****?**

The Circuit Court said "No."
The Court of Appeals said "No."
Appellee says "No."
Appellant City says "Yes."
This Court should say "Yes."

## INTRODUCTION

The Religious Land Use and Institutionalized Persons Act (RLUIPA)[1] prohibits discrimination against religious activities in local land use decisions. It does so by proscribing regulations that impose a substantial burden on the exercise of religion when applied to a specific proposed land use, unless there is a compelling governmental interest in applying the regulation and the government has chosen the least restrictive means of regulation. RLUIPA's goal is the equal—but not special—treatment of religious activities in the land use context.

This case involves the Greater Bible Way Temple's (GBW's) petition to the Jackson City Council for a legislative amendment to the City's zoning ordinance changing the classification of several adjacent subdivision lots in the heart of an existing single-family residential neighborhood to allow for a multiple-family apartment complex use. The City Council refused to enact the amendment, concluding that the uses allowed in the multiple-family zoning district would be incompatible with the long-established character of the existing neighborhood and the single-family residential zoning that had been relied on by the rest of the neighborhood; would be inconsistent with the City's Land Use Plan; and would be contradictory to the City's multi-decade struggle to preserve the stable single-family neighborhoods in the City.

GBW filed a two-count complaint against the City containing both a "traditional" zoning claim (i.e., taking/inverse condemnation and due process/arbitrary and capricious action, etc.) and a challenge under RLUIPA. The zoning claim was disposed of well short of trial, on the City's motion for summary disposition, with the trial court finding that the denial of rezoning was not arbitrary or capricious, and that the existing single-family classification of the property furthered legitimate governmental interests. ***GBW never appealed that determination***.

[1] 42 USC 2000cc, *et seq*.

On GBW's subsequent motion for summary disposition on the RLUIPA claim, the trial court employed a much less-deferential analysis, and reached a much different result.[2] The trial court found in favor of GBW on most of the elements of its RLUIPA claim, concluding as a ***matter of law*** that (1) GBW was a religious entity seeking an individualized decision on a proposed land use; (2) the construction of an apartment building providing housing in the area was a religious exercise, because GBW asserted it to be part of GBW's "mission"; and (3) the City's refusal to rezone the property constituted a substantial burden on that religious exercise more or less by definition, since it had the effect of precluding what GBW wanted to do.

The trial court did hold an evidentiary hearing on the two remaining issues in GBW's RLUIPA challenge: whether the City's interest in sustaining the single-family character of the area was a "compelling" governmental interest and whether the denial was the "least restrictive means" of achieving that interest. After two days of testimony, the trial court held that the City failed to establish either a sufficiently significant interest or a proper means of accomplishing it. The Court of Appeals affirmed the trial court's conclusion and reasoning in a published decision.

The decisions of the lower courts in this case did not protect the purported religious activity at issue from unequal treatment. They effectively exempted that activity from regulation, and in doing so misconstrued RLUIPA and expanded its application well beyond its constitutional boundaries. If RLUIPA merely "codified" existing case law addressing the First Amendment's Free Exercise and Establishment Clauses—and that must be the case if the statute is to be found constitutional[3]—no such favoritism of religious uses is contemplated, and the lower courts erred in

[2] By the time of the parties' cross-motions for summary disposition on the RLUIPA issue, the case had been re-assigned to a different judge.

[3] The United States Supreme Court has had occasion to speak to the constitutional validity of RLUIPA in *Cutter v Wilkenson*, 544 US 709; 125 S Ct 2113; 161 L Ed 2d 1020 (2005). However, that case involved Section 3 of RLUIPA, which addresses the religious exercise rights of institutionalized persons. The Court expressly clarified that Section 2 of RLUIPA, now being reviewed by this Court, was not at issue, and that no view was being expressed on the validity of Section 2 of the Act at issue here. 125 S Ct 2118, n. 3.

granting GBW what amounts to a special status for land use and development purposes, a sort of "super-developer" status.

The lower courts erred:

(1) By finding that the City's consideration of GBW's rezoning request was an ***individualized assessment*** of the proposed multiple-family use. Because this was a rezoning—a legislative act—a specific development plan on which an individualized decision could be made was never proposed. The City's task on an application for rezoning is to consider a whole group of potential uses under the requested classification and not just the individual petitioner and its potential use or intention.

(2) By finding that the proposed use was a ***religious exercise***. There was no evidence (either at the summary disposition stage or at the hearing) that multiple-family dwelling units would be reserved for church members, no evidence that they would be rented at less than market rates, no evidence that they would be restricted for use based on age or disability. The activity proposed here, while laudable, is essentially commercial in nature.

(3) By finding that the denial of the rezoning imposed a ***substantial burden*** on GBW. GBW itself acknowledged that it owns other multiple-family units elsewhere in the City and state where the zoning is appropriate. What GBW wanted may have been more convenient for it, but even RLUIPA does not mandate legislation for religious convenience.

(4) By finding that there was no ***compelling governmental interest*** in retaining the single-family character of the neighborhood. The encouragement of homeownership in vital and vibrant single-family neighborhoods is a classic and fundamental governmental interest, one that is particularly acute for older urban cities like Jackson. The City has clearly established a solid track record of attempting to save and improve its existing single-family neighborhoods, and the evidentiary record below reflects the adverse impact on that plan that would result from a court-ordered rezoning of the property at issue.

The great irony of this case is that, in their analysis of a statute that exists to prevent the coercion of action inconsistent with religious beliefs and to protect the right to religious exercise without interference by others, the lower courts found completely irrelevant the City Council's legislative determination that what the Church wanted to do—construct an apartment complex in the middle of a single-family neighborhood—would interfere with the rights of the Church's neighbors and result in harm to those neighbors, to the area, and to the City as a whole. Even without the

prompting to "love thy neighbor," a traditional First Amendment analysis of legislative action would provide for—and in fact would compel—an evaluation of that conclusion. So must RLUIPA.

## STATEMENT OF FACTS

### *A. The City*

The City of Jackson can be characterized as an "older urban community" with many assets. Yet, it is plagued with problems common to many other cities of the same character throughout the state and nation. Simply stated, older communities have struggled with neighborhood viability issues, including dwindling population bases and the loss of financial strength.

The policymakers in Jackson have not simply acquiesced in this all-too-common circumstance. Rather, particularly as it relates to the issues presented in this case, the City has taken positive steps to combat the deterioration of its neighborhoods. The hurdles as well as the stakes are high, but Jackson has approached this issue very methodically through long-term planning efforts.

As reflected in the City's Land Use Plan, admitted as Defendant's Appendix 6 at trial,[4] the City has determined to preserve the city center for commercial use while providing support for that center from residential uses in strategic locations throughout the City, including the location of high-density residential districts on the perimeter of the city center, along park areas, and on major thoroughfares elsewhere in the City.

While the City has a high percentage of apartment dwellings relative to the balance of the county,[5] the Land Use Plan also shows that the City's long-standing neighborhoods, to a significant degree, have been preserved for "low-density" (single-family) residential use. The preservation of these neighborhoods has been a challenge, given the presence of an aging housing stock and associated issues facing nearly all older urban communities. The City has combated, and continues

[4] Appellant's Appendix, 506a.
[5] Appellant's Appendix, 474a.

to struggle with, these issues as a matter of formal City policy dating back to the 1970s. The City's efforts in this regard have included "neighborhood development" programs that have provided "millions of dollars of funding for neighborhood improvement," including the promotion of single-family housing units.[6] Through its Land Use Plan, as implemented by the zoning ordinance, the City has fought for the viability of its single-family neighborhoods.[7]

Charles Reisdorf, the Executive Director of the Regional Planning Commission serving the relatively large regional area that includes the City, testified about the thinking behind such programs aimed at preserving the single-family neighborhoods. Mr. Reisdorf, a professional planner, points out that an effort must be made to protect neighborhoods from infiltration by other uses:

> ". . . in an area where you have a large number of single-family residences, people have made purchases with the expectation that there will be some stability in the neighborhood. For most of us, the purchase of a home is the major expense of our life . . . And so when you – when you have something that's incompatible interjected into a neighborhood area, it creates problems and often results in a blighting situation . . . And, in fact, that was the purpose of the neighborhood development program and the community's efforts in its (Federal Housing and Urban Development) block grant program to preserve housing and neighborhoods. You know, a neighborhood is the building block of a community, and we're only as strong as our neighborhoods in this community."[8]

Along the same lines, Dennis Diffenderfer, a planner who has been with the City's Department of Community Development for nearly 20 years, discussed the various City programs to support single-family housing. He pointed out that the City has initiated programs "to acquire either tax reverted or bank foreclosed or other properties that are on the market and reinvest in those properties, sometimes to the tune of $60,000 to 70,000 . . . and then we are selling those properties to

[6] Appellant's Appendix, 475a.
[7] Appellant's Appendix, 475a.
[8] Appellant's Appendix, 477a-478a.

owner-occupied buyers."[9] Mr. Diffenderfer discussed other programs in the City designed to enhance single-family housing in the City.[10] He reiterated that these programs exist to help preserve single-family neighborhoods, because ". . . any time you even add a duplex or a three- or four-unit or a number of buildings that convert to rental, it does have a negative effect on the adjoining neighbors. I can speak not only as a housing professional, but from personal experience . . ."[11]

Charles Aymond, a local attorney who specializes in real estate transactions, has served as the Chair of the Jackson Planning Commission for over ten years. He pointed out that "The planning commission has been trying to protect residential neighborhoods from competing uses . . ."[12] Not as a matter of theoretical testimony by an expert witness, but as a person knowledgeable in real estate and zoning/planning matters in the City of Jackson, Mr. Aymond was able to relate to the Court ***actual experience in the City***, clarifying that, ". . . the City has experienced a great deal of blight and destabilization as the result of commercial enterprises in non[sic]–residential or different residential uses coming into what is generally referred to as a 'higher residential use.'"[13]

Far from discriminating against religious uses (the main focus of RLUIPA), the City has promoted such uses. The City's actions with respect to GBW are a good example. Defendant's Appendix 5 reflects that the City granted eight of the nine proposals by GBW before the Planning Commission, Zoning Board of Appeals, or City Council with regard to GBW's main worship area or church at 327 Madison—across the street from the subject property.[14] The record reflects that one such proposal was even approved by the City Council over the objection of the Planning Commission. This cooperation with GBW was confirmed by Planning Chair Aymond, who testified

[9] Appellant's Appendix, 567a, 572a-573a.
[10] Appellant's Appendix, 576a-577a.
[11] Appellant's Appendix, 585a.
[12] Appellant's Appendix, 547a.
[13] Appellant's Appendix, 553a.
[14] Appellant's Appendix, 504a

that, "The church has come to the planning commission and the City on many other issues and . . . we've always supported those in the past."[15] No testimony was offered by GBW to suggest that such cooperation has not consistently occurred.

GBW's proposal in this case asked the legislative body of the City to reclassify land in the middle of a neighborhood from R-1 (single-family residential) to R-3 (multiple-family residential). While the City Council denied this proposal, in terms of other instances of rezoning from R-1 to R-3, the record indicates that the City has been receptive to such petitions where the property is situated in appropriate areas, such as along major thoroughfares.[16]

***B. The Property***

The assembled property at issue comprises several contiguous single-family subdivision lots, as shown on the aerial photo admitted at trial as Defendant's Appendix 4.[17] Most of the lots are vacant, although an existing single-family residence is situated on one of the lots. Some of the lots front on Jefferson Street and some front on Madison Street, the latter being the street on which GBW's church is situated (depicted with the "R-4" zoning designation on attached Defendant's Appendix 2). The lots were purchased by GBW in approximately 2000.[18]

C. Jan Markowski, the City Assessor for some 12 years, who holds the highest assessing rating that can be achieved in the State of Michigan, testified without objection to an appraised value of the subject property. Assessor Markowski determined that the value of the property, including the existing single-family residence, is $92,400. This appraisal reflects a market value for vacant lots in this area of $2,500 per lot.[19]

[15] Appellant's Appendix, 551a.
[16] Appellant's Appendix, 511a, 538a-540a.
[17] Appellant's Appendix, 948a.
[18] Appellant's Appendix, 595a.
[19] Appellant's Appendix, 592a-594a, 602a.

Mr. Reisdorf, the regional planner, pointed out that the two streets on which the property is situated are "neighborhood streets" on which children often play; "they're just not designed for . . . higher volumes of traffic and the typical driver just doesn't expect to experience . . . children in streets . . . it's not an area that's conducive for higher density development."[20]

### *C. The Re-Zoning Proposal*

The record contains references to various development concepts informally discussed by GBW for the lots in question. Yet, ***none of the plans reflecting such concepts were admitted into evidence***, and GBW's legal counsel made it clear during the course of the proceedings that the court was not being asked for an order allowing development for a specific plan of development. In the words of GBW's counsel, "The site plan itself is irrelevant when it comes to requesting rezoning from R-1 to R-3," since the court was "just ruling on the rezoning."[21]

In other words, GBW's complaint claimed relief under RLUIPA asserting a desire to provide housing for the elderly and handicapped, but at least initially the Church indicated that it did not want a court order that would restrict its use of the property for a specified plan; it wanted all R-3 uses and standards available to it. At the conclusion of the trial court proceedings, a Final Order dated September 3, 2003, was entered giving GBW the right to build 32 apartment units on the property (a number reflecting one of the initial proposals GBW had informally submitted), as permitted under the R-3 classification.[22]

Mr. Reisdorf explained that the principal difference between single-family (R-1) and multiple-family (R-3) residences is the "density of housing." As planned and zoned, eight single-family residences could be constructed on GBW's lots in the middle of this subdivision. While

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[20] Appellant's Appendix, 508a.
[21] Appellant's Appendix, 523a.
[22] Final Order, September 3, 2003, Appellant's Appendix, 853a1. An earlier order dated July 29, 2003, had authorized all uses in the R-3 district. That order was vacated by the trial court and the September 3, 2003, order was substituted.

GBW's representative, Reverend Combs, acknowledged that an eight-home single-family development would be "helping" in terms of GBW's objectives,[23] he confirmed that GBW nonetheless sought to alter the zoning plan of the City to permit at least 32 apartment units on the subject property—four times the number of homes permitted under the R-1 classification.[24]

Mr. Reisdorf also sponsored Defendant's Appendix 1, the ITE vehicular "trip generation" manual published by the Institute of Transportation Engineers (1987). This manual reflects that the average number of vehicle trips per day generated by a single-family residence is about 10, while the average number of vehicle trips per day generated by a low-rise multiple-family dwelling is about 6.6 per unit.[25] Applying these vehicular trip generation guidelines from the authoritative traffic engineer's manual to the subdivision lots in question, simple math establishes that, on the local neighborhood streets serving the property, GBW's R-3 proposal would generate some 198 vehicle trips per day (6.6 trips per day x 32 apartment units), as compared to 80 trips per day (10 trips per day x 8 homes) generated by the single-family residences.[26] The Regional Planning Commission had recommended denial of GBW's R-3 proposal in part because it "will significantly change the character of the neighborhood, . . .add excessive density . . . of this stable, single-family neighborhood."[27]

Charles Aymond, the Planning Commission Chair, pointed out that "The planning commission has been trying to protect residential neighborhoods from competing uses . . . This is a stable, single-family residential area . . ."[28] Later in his testimony, Mr. Aymond pointed out that inserting R-3 zoning into this single-family neighborhood would have a destabilizing effect: "People

[23] Appellant's Appendix, 689a.
[24] Appellant's Appendix, 481a-482a.
[25] Appellant's Appendix, 479a.
[26] Appellant's Appendix, 496a.
[27] Appellant's Appendix, 500a.
[28] Appellant's Appendix, 546a.

are investing in their homes and once you change the character of the neighborhood, you are going to have a destabilizing impact."[29]

On cross-examination, Mr. Aymond provided further clarity with regard to the destabilizing effect on the single-family neighborhood: "That's the whole reason why you have zoning, is you're trying to restrict the uses to compatible uses, and . . . we have R-1 districts that are intended to be single families and districts."[30] Later in his testimony, Mr. Aymond summarized to a great degree the motivation on the part of the City in this matter: ". . . this is a very fine neighborhood and I don't want to upset this neighborhood . . . ***That's one of the reasons why people are leaving the City*** and the population is going down all the time, is because people don't feel that they can get a solid value and that there is some predictability about . . . the quality of their . . . residential neighborhoods."[31] (Emphasis added.)

The City also called as witnesses several residents of the neighborhood in which the subdivision lots are situated. The general points to be gleaned from their testimony include that: the subject subdivision lots are in a fine neighborhood; children play in the neighborhood; the streets are not capable of accommodating higher intensity use, since even without the proposed apartments, there are various times during the year when, due to the activities at GBW's church, the streets become non-functional for the neighborhood residents; and, finally, homeowners in the neighborhood have relied upon the area remaining single-family residential, and investments have been made accordingly—but, if GBW's proposal is granted, considerable instability will result.[32]

GBW's testimony through Reverend Combs frankly did not respond to the concerns for GBW's proposed rezoning as expressed by the City's planning witnesses and neighborhood

[29] Appellant's Appendix, 548a.
[30] Appellant's Appendix, 549a.
[31] Appellant's Appendix, 557a.
[32] See generally, Appellant's Appendix, 603a-630a.

residents. Reverend Combs testified, for example, that traffic congestion was "a moot issue" because, while the R-3 zoning being sought would authorize 32 apartment units generating some 198 vehicle trips per day, the Church could already use its own worship facility property across the street (for some uncertain time) to house individuals who were elderly or had disabilities.[33]

A similarly vague response was given by Reverend Combs with regard to the testimony of the City's experienced witnesses relative to other adverse impacts that would result from inserting apartments within a single-family neighborhood. Again, Reverend Combs suggested that, "We're not proposing, ***at this point***, 32 units."[34]

Reverend Combs did not suggest that the City's neighborhood development programs to encourage single-family residential uses in neighborhoods could not be productively utilized to achieve the goals of the church—for example, by building single-family homes on the lots. Rather, he indicated that, "We are not interested in doing—being involved in a tax credit program and/or being involved in government subsidies," and ". . . we were interested in carrying the project ourselves . . . ."[35] Such a self-sufficient attitude would otherwise be laudable if it did not result in such serious disruption to the long-term planning and community development policies of the City.

James Pappas, an architect, was permitted to testify on behalf of GBW.[36] As did Reverend Combs, Mr. Pappas focused his testimony on a certain type of development that ***could be*** designed and used on the property—a senior development,[37] despite the fact that GBW had to that point rejected a limitation upon any particular use plan. While Mr. Pappas thus did not testify with regard to the impacts that would result from a specific development (e.g., the 32 units under the Final

[33] Appellant's Appendix, 669a.
[34] Appellant's Appendix, 670a, emphasis supplied.
[35] Appellant's Appendix, 674a, 684a.
[36] Appellant's Appendix, 476a.
[37] See, e.g., Appellant's Appendix, 481a, 486a, 488a, 494a, 496a, 498a.

Order), he did acknowledge that, under R-3 zoning, construction up to 45 feet in height would be permitted—a result that even he stated would be "inappropriate with that neighborhood."[38]

### *D. The City's Decision*

At the conclusion of the proceedings before the City, the City Council, consistent with the recommendations of both the Regional Planning Commission and the City Planning Commission, declined to adopt legislation that would have the effect of making the zoning change requested by GBW. Mr. Reisdorf, who has been closely associated with the City's planning efforts, testified with regard to GBW's R-3 proposal that "I think the City would welcome this project, properly located," and that other similar proposals have, indeed, been granted in the City where situated on major thoroughfares and adjacent to more intense uses.[39]

### *E. The Lower Court Proceedings*

GBW filed a two-count complaint challenging the City's refusal to legislate in the manner it had requested. Count I sought relief that might be characterized as a "traditional" zoning challenge (taking/due process/equal protection). Count II sought relief under RLUIPA.[40] The trial court held in favor of the City on Count I, but ruled in favor of GBW on Count II. GBW did not appeal the ruling on Count I. The City, however, filed a timely claim of appeal in the Court of Appeals contesting the adverse determination on Count II. By published opinion dated November 10, 2005, the Court of Appeals affirmed the decision of the circuit. *Greater Bible Way Temple v City of Jackson,* 268 Mich App 673; 708 NW2d 756 (2005).

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[38] Appellant's Appendix, 505a-506a, 509a.

[39] Appellant's Appendix, 538a-540a. When GBW's rezoning proposal was before the Jackson Planning Commission, Mr. Aymond, the Planning Commission Chair, made the affirmative effort of showing GBW's representative, Reverend Combs, several other sites in the vicinity—within a block or two—that were compatibly zoned for the R-3 use. (Id. 550a).

[40] See, Opinion and Order of Honorable Alexander C. Perlos, dated August 7, 2002, Appendix 49a.

### a. Traditional Zoning Challenge

The trial court's August 7, 2002, opinion and order identifies the issues and disposition made as to the zoning claim:

> "The Court finds that the denial of [the City's] rezoning request by [GBW] was not unreasonable, nor was it arbitrary or capriciously applied in this case.
>
> THEREFORE, the Court is satisfied that the denial by [the City] to rezone [GBW's] property was substantially related to public health, safety, morals or general welfare and the Court does not see any reason why it should disturb the ruling of the [City] in denying the rezoning request.
>
> IT IS HEREBY ORDERED that Count I of the Complaint is DISMISSED."

### b. RLUIPA Challenge

The parties filed cross-motions for summary disposition on the RLUIPA claim. The motions were heard on January 16, 2003, following which Honorable Chad C. Schmucker (successor to Judge Perlos) filed an opinion dated February 25, 2003.[41] This opinion addressed the three threshold issues presented under RLUIPA: (1) whether the legislative decision of the City Council denying the proposed rezoning to GBW amounts to an "individualized assessment"; (2) whether the City's denial of relief caused a "substantial burden" upon GBW's rights to free exercise of religion; and, (3) if (and only if) these two threshold determinations are made in GBW's favor, whether the City has demonstrated that the refusal to legislate in the manner requested by GBW implemented a compelling governmental interest of the City, in the least restrictive manner possible.

[41] Appellant's Appendix, 378a.

### *i. Individualized Assessment*

The trial court concluded that "the City of Jackson's review of GBW's request for rezoning was an individualized assessment."[42] In drawing this conclusion, the Court relied not upon a case such as the present one, in which a ***rezoning*** was sought, but on a case in which an ***administrative conditional use permit*** was at issue.[43] The Court of Appeals affirmed, citing *Shepherd Montessori Center Milan v Ann Arbor Charter*, 259 Mich App 315 (2003), also involving only administrative decisions interpreting a zoning ordinance and acting upon a variance application by a township zoning board of appeals.

### ii. *Substantial Burden on Free Exercise Rights*

The trial court also granted summary disposition in favor of GBW on the issue whether the City's action resulted in a "substantial burden" on GBW's free exercise of religion, concluding simply that the denial of the rezoning prevented GBW from implementing its proposed housing use. The court assumed that the use itself was a religious exercise because GBW claimed it was—the court found no issue of fact, in other words, as to whether the apartments would be restricted to a particular class of users, leased at an under-market rental rate, or restricted to persons in any way connected to or involved in the free exercise of religion. The court also found that no issues existed as to whether GBW could have achieved its housing objectives on other nearby properties that could be rezoned or otherwise used (possibly with the support of the City) for multiple-family residential use. The Court of Appeals affirmed, making the same assumptions.[44]

### iii. *City's Governmental Interest*

Following its grant of summary disposition on the individualized assessment and substantial burden issues, the trial court held a hearing on the limited question whether the City had

[42] Appellant's Appendix, 379a.
[43] *Jesus Center v Farmington Hills*, 215 Mich App 54; 544 NW2d 698 (1996).

demonstrated that its actions were in furtherance of a "compelling governmental interest" and represented the "least restrictive means" of furthering that interest. The court found the Ciy's professed interest in preserving the existing neighborhood insufficient, and the Court of Appeals affirmed, apparently on the ground that the City's witnesses could not certify to an absolute certainty that adverse consequences in this particular neighborhood would occur.[45]

**d. *Constitutionality of RLUIPA***

The City also challenged the constitutionality of RLUIPA. The Court of Appeals addressed this issue at length, finding the enactment to be constitutional.

On December 22, 2005, the City filed a timely Application for Leave to Appeal from the determination of the Court of Appeals, and, on May 4, 2006, this Court entered its order granting application for leave to appeal in the present case along with the companion case addressing the propriety of the award of attorney's fees to GBW (Supreme Court Case No. 130196).

## SUMMARY OF ARGUMENT

According to a good majority of courts and commentators, the intent of the U.S. Congress in enacting RLUIPA was to ***codify*** the then-existing Free Exercise Clause and Establishment Clause jurisprudence of the United States Supreme Court. See, e.g., *Midrash Sephardi, Inc v Town of Surfside,* 366 F3d 1214, 1239 (CA 11, 2004); *Civil Liberties for Urban Believers v. City of Chicago,* 342 F3d 752, 760-61 (CA 7, 2003); and *Murphy v New Milford Zoning Comm'n*, 402 F3d 342, 350 (CA 2, 2005). While some have questioned this operating presumption,[46] to conclude otherwise ignores the fact that RLUIPA employs terms and concepts that are well defined in pre-RLUIPA Supreme Court case law.

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[44] Appellant's Appendix, 380a-381a.
[45] Appellant's Appendix, 381a-382a.
[46] *Elsinore Christian Center v City of Lake Elsinore*, 291 F Supp 2d 1083 (CD Cal 2003).

As occurred in the lower courts here, the failure to acknowledge, understand, and apply the pivotal terms of art in RLUIPA in the context of pre-RLIUPA case law leads inevitably to a misconstruction of the statute. Without reference to the cases from which it came, the language of RLUIPA is loosed from its jurisprudential moorings—so carefully established by the Supreme Court—and becomes susceptible to a reading (as occurred here) that renders it unconstitutional on First Amendment grounds.

Pre-RLUIPA U.S. Supreme Court cases such as *Employment Division v Smith*, 494 US 872; 110 S Ct 1595; 108 L Ed 2d 876 (1990); *Church of the Lukumi Babalu Aye, Inc v City of Hialeah,* 508 US 520; 113 S Ct 2217; 124 L Ed 2d 472 (1993); *City of Boerne v Flores*, 527 US 507; 117 S Ct 2157; 138 L Ed 2d 624 (1997), and *Sherbert v Verner,* 374 US 398; 83 S Ct 1790; 10 L Ed 2d 965 (1963), create a shield against governmental discrimination aimed at the exercise of religious beliefs. They hold that regulatory actions by local governments intended to prevent harm—that is, to protect the pubic health, safety, and welfare—must result in an evenly-distributed burden upon religious and non-religious activities alike, and may not treat religious exercises as inferior.

Under this well-settled case law, where a local land use regulation is neutral with regard to the free exercise of religious beliefs, judicial scrutiny is generally to be conducted on a "rational review" basis. Heightened or "strict" scrutiny, sometimes called "compelling interest" review, is reserved for those cases involving non-neutral regulations, or cases in which a governmental agency is asked or required to take into specific consideration the religious nature of the activity being regulated. *Smith, supra*, at 883-885. Thus, "where the State has in place a ***system of individualized exemptions***," but "***refuses to extend that system to cases of 'religious hardship,***'" the requirement that a compelling governmental interest in the regulation must exist can often *un*-mask a hostile intent behind a seemingly inoffensive rule or regulation. *Id.* at 884 (emphasis added).

Pre-RLUIPA cases also hold that strict scrutiny is to be invoked in cases where governmental regulations impose a ***substantial burden*** on the exercise of religious beliefs. Incidental burdens—e.g., the kind that any landowner has to suffer in the context of a system of land use regulation that assigns rights and obligations to all properties under a typical "Euclidean" approach to zoning—are shared burdens. To invoke a heightened standard of review, a burden must rise to the level of an oppressive, discriminatory act intended to limit the exercise of religion in a particular circumstance before it will be found to be truly "substantial."[47]

That Congress in enacting RLUIPA took this case law into consideration is clear from the language of that section. By its terms, RLUIPA's jurisdiction is triggered only for land use regulations that "substantially burden" the exercise of religious rights, and then only if the burden is imposed in implementation of a system of regulation that permits "individualized assessments" of the proposed uses for the property involved.

When viewed in this proper historical/constitutional context:

- ***There was no individualized assessment of GBW's proposed use in this case.*** The action requested of the City was an exercise of the City Council's legislative authority, a zoning district map amendment, in the context of determining whether to establish a multiple-family zoning district in the heart of a single-family neighborhood—***regardless*** of the user, and ***regardless*** of any specific proposed use.

- ***There was no religious exercise at issue in this case.*** The proposed apartment complex improvement is indistinguishable, from a land use perspective, from any other wholly ***commercial*** real estate development endeavor, regardless of GBW's motives for engaging in it. RLUIPA was not meant to exempt commercial-type uses from facially-neutral zoning regulations.

- ***There was no substantial burden on religious exercise in this case.*** No "coercion" of religious beliefs occurred here. That GBW would lose (or not make as much) investment money if the project were not built is both speculative and irrelevant; RLUIPA was not enacted to provide financial advantage to religious exercisers. That GBW could not find other multiple-family property for the use is also not attributable to any sort of "discrimination" by the City in that regard.

[47] See, e.g., *City of Boerne, supra.*

- ***There is a compelling interest in protecting the vitality of its single-family neighborhoods.*** The regulation of land use to protect families in residential areas is as fundamental an exercise of the police power as there is. Particularly in older communities, protecting stable neighborhoods is a matter of municipal survival.

RLUIPA should be read so as to render it constitutional. The lower courts in this case applied it instead to create a special status for religious land uses, and in doing so stood decades of land use planning and zoning law on its head and transformed a statute aimed at the prevention of discrimination against religious exercisers into a weapon to be wielded against municipalities and other non-religious land owners. This Court must remedy that error.

## STANDARD OF REVIEW

The Michigan Supreme Court reviews a summary disposition ruling de novo to determine whether the moving party is entitled to judgment as a matter of law.[48] Questions of statutory construction are reviewed de novo.[49] Findings of fact made by the trial court are subject to the clearly erroneous standard, which requires reversal if there is no evidence to support the fact or the Court is left with a "definite and firm conviction that a mistake has been made."[50] Michigan courts are bound by decisions of the U.S. Supreme Court on federal questions.[51] Where there is no decision by the U.S. Supreme Court and the federal courts disagree on the interpretation of a federal statute, courts may adopt a view that appears most appropriate under the circumstances.[52] Questions regarding the constitutionality of statutes are reviewed de novo on appeal.[53]



[48] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).
[49] *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991); *Roberts v Mecosta Co General Hosp*, 466 Mich 57, 62; 642 NW2d 663 (2002).
[50] *Hertz Corp v Volvo Truck Corp*, 210 Mich App 243; 533 NW2d 15 (1995); *Szymanski v Brown*, 221 Mich App 423, 433; 562 NW2d 212 (1997).
[51] *People v Stevens*, 460 Mich 626; 1597 NW2d 53 (1999), *Schueler v Weintrob*, 360 Mich 621; 105 NW2d 42 (1960); and *Cook v Detroit*, 125 Mich App 724, 730; 337 NW2d 277 (1983).
[52] See *Schueler*, *supra*; *Bruno* v *Department of Treasury*, 157 Mich App 122, 130; 403 NW2d 519 (1987).
[53] See *Tolksdorf v Griffith*, 464 Mich 1, 5; 626 NW2d 163 (2001); *Macenas v Village of Michiana*, 433 Mich 380, 391; 446 NW2d 102 (1989).

## ARGUMENT

**I. Plaintiff GBW asked the City of Jackson to enact legislation materially altering an established single-family residential zoning district by re-classifying several subdivision lots owned by the GBW in the middle of a stable single-family neighborhood to a multiple-family classification, to allow for construction of an apartment complex. The GBW did not propose a specific use or development. On the basis of long-standing legislative policy in the City, and considering the reliance of the GBW's neighbors on the continuation of the existing single-family zoning, the City Council determined to keep the single-family residential district in tact. This legislative policy decision by the City was *not* an "individualized assessment" of a land use under RLUIPA, and therefore is *not* subject to "compelling interest" scrutiny.**

GBW asked the Jackson City Council to enact an ordinance amendment that would substantially change the legislatively-drawn boundaries of a single-family residential zoning district, displacing that existing classification on several subdivision lots and establishing in its place a multiple-family zoning district as an island within the subdivision. As a matter of law, RLUIPA does not apply to the Council's determination not to enact that ordinance amendment, because a legislative determination made by a duly-elected body is not an "individualized assessment" of a proposed land use. It is, rather, a policy deliberation focusing on whether to alter one part of a much larger piece of the comprehensive zoning legislation affecting the City as a whole. There is no indication in the language of RLUIPA of a clear congressional intent to invalidate such legislative decision making by local governments by subjecting it to heightened scrutiny and thereby causing a wholesale change of the zoning jurisprudence in this state and throughout the country.

### 1. *RLUIPA's "Individualized Assessment" Language is Grounded in Pre-RLUIPA Case Law Interpreting the Free Exercise Clause.*

The "individualized assessment" test was not simply woven by Congress out of whole cloth. It is a term of art embodied in decisional law of the U.S. Supreme Court in connection with the Free Exercise/Establishment Clauses. As noted above, some courts have held that "[w]hat Congress

manifestly has done in this subsection [(a)(2)(C)] is to codify the individualized assessments jurisprudence in Free Exercise cases that originated with the Supreme Court's decision in *Sherbert v Verner,* 374 US 398; 83 S Ct 1790; 10 L Ed 2 965 (1963)." *Freedom Baptist Church of Delaware County v Twp of Middletown*, 204 F Supp 2d 857, 868 (ED Pa, 2002). But regardless of whether this Court agrees that Congress intended a technical codification of that prior case law, the contours of the U.S. Supreme Court's Free Exercise Clause cases, including those outlining the individualized assessment analysis, are crucial to understanding and applying RLUIPA.

This Court has consistently reiterated a set of rules for the construction of statutes enacted by the Michigan Legislature: First, the primary goal is to determine the intent of the Legislature—if a statute's language is clear and unambiguous, it must be enforced as written; second, the Legislature is presumed to have intended the meaning expressed in the words it wrote; and finally, all words and phrases not defined in the statute are construed and understood according to the common and approved usage of the language. *Grimes v Michigan Dept of Transportation*, 475 Mich 72, 93; ___NW2d ___ (2006). The same essential analysis has been applied in the federal courts, including by courts construing RLUIPA.[54]

Careful statutory construction is important in order to carry out the rule of law. Words have meanings, and the consistent application of statutes depends upon an unswerving faithfulness to such meanings. Likewise, terms of art have special meanings. In *Nippa v Botsford General Hospital*, 251 Mich App 664; 651 NW2d 103 (2002), vac'd *on other grds*, 468 Mich 882 (2003), quoting earlier opinions of the Court, it was confirmed that,

> "[W]here the statute does not define a word, we are compelled to ascribe to it the common and ordinary meaning. MCL 8.3a; *Herald Co. v Bay City,* 463 Mich 111, 118, 614 NW2d 873 (2000); *Massey v Mandell,* 462 Mich 375, 380, 614 NW2d 70 (2000). However, where the word is "a legal term of art" that has acquired a particular meaning

[54] See, e.g., *San Jose Christian College v City of Morgan Hill*, 360 F3d 1024, 1034 (CA 9, 2004).

> in the law, ***we are required to abide by that definition***. *Id* at 386, 614 NW2d 70 (Corrigan, J., concurring); *People v Law,* 459 Mich 419, 425, n. 8, 591 NW2d 20 (1999); see also *Consumers Power Co v Public Service Comm.,* 460 Mich 148, 163, 596 NW2d 126 (1999). (*Emphasis added.*)

The same rules guide the federal courts. When Congress enacts statutes using terms of art that the Court has previously interpreted, Congress intends those terms have the same meaning.[55]

In *Employment Division v Smith,* 494 US 872; 110 S Ct 1595; 108 L Ed 2d 876 (1990), Justice Scalia, writing for the majority, pointed out that the Free Exercise Clause does not relieve a religious exerciser of the obligation to comply with a neutral, generally applicable law. It does, however, require greater scrutiny ("compelling interest") of laws that are ***aimed at religion.*** Government action can be fairly described as being aimed at religion "where the State has in place a ***system of individualized exemptions,***" but "***refuses to extend*** **that system** ***to cases of 'religious hardship.'***"[56] Government action of that type, the Court reasoned, shows that neutral policies are not being pursued, but that religion is being singled out to bear a disproportionate burden.[57]

The foundation for this analysis in *Smith* is found in *Sherbert, supra*, whose Free Exercise Clause compelling interest test "was developed in a context amenable to ***individualized government assessment*** of the reasons for the relevant conduct."[58] *Sherbert* is an unemployment case that held that a state could not constitutionally deny benefits to a member of the Seventh Day Adventist Church who could not find work because her religious convictions prevented her from working on Saturdays. Because the statute's distribution of benefits permitted "individualized exemptions" based on good cause, the state could not refuse to accept plaintiff's religious reasons for not working on

[55] *McDermott International, Inc v Wilender*, 498 US 337, 342; 111 S Ct 807; 112 L Ed 2d 866 (1991).
[56] *Smith, supra* at 884 (emphasis supplied).
[57] *Id.*
[58] *Id.*

Saturdays—while allowing it for Sunday worshipers—as good cause without satisfying compelling interest scrutiny.[59]

The Supreme Court's "individualized assessment" doctrine also found voice in *Church of the Lukumi Babalu, supra*, which was decided after *Smith*, but before the enactment of RLUIPA. In that case, the Court invalidated an animal-cruelty ordinance that required the government to evaluate the justification for animal killings on the basis of whether such killings were "unnecessary."[60] The Court held that this was a system of individualized assessments, because the ordinance required an evaluation of the specific justification for the particular killing.* The system failed compelling interest scrutiny, because the City of Hialeah had reviewed religious reasons for killing animals differently by "judging them to be of lesser import than nonreligious reasons."[61]

There is a no dispute in this case that the zoning ordinance has not been administered in an ***overtly*** discriminatory manner. ***The question presented is thus whether the City's legislative action involved a system of individualized assessments and, if so, whether the City refused to extend that system to a case of religious hardship.***[62] More specifically, the Court's first inquiry in this case needs to be whether the consideration of a legislative amendment that would reclassify an R-1 single-family residential area within the City to an R-3 multiple-family residential classification—and thereby create a multiple-family island within an established residential neighborhood, a ***spot zone*** under traditionally applicable zoning cases[63]—amounts to a system of individualized assessments.[64]



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[59] *Sherbert, supra* at 405-407.
[60] *Church of the Lukumi Babalu Aye, supra* at 537.
[61] *Id.*
[62] *Smith, supra* at 884.
[63] See, e.g., *Penning v Owens*, 340 Mich 355, 367-68; 65 NW2d 831 (1954); *Anderson v Highland Twp*, 21 Mich App 64, 75; 174 NW3d 909 (1969); *M & S Builders v Dearborn*, 344 Mich 17; 73 NW2d 283 (1955).
[64] The point that "individualized assessments" may arise out of subjective administrative discretion is found in *Living Water Church of God v Charter Twp of Meridian,* 384 F Supp 2d 1123, 1130 (WD Mich, 2005) (special use permit

The answer to this question is a clear and resounding "No." The decision of the City Council in this matter was a major ***policy decision*** about whether to enact legislation that would significantly alter an established zoning district and contradict long-standing City policy seeking to preserve single-family residential neighborhoods. The City's decision in this case is not remotely akin to those in the narrowly-focused exemption cases described above.

### 2. *Action to Adopt or Amend Local Legislation in the Form of Zoning is Not What is Meant in RLUIPA by an "Individualized Assessment."*

An examination of RLUIPA cases throughout the country reveals that nearly all of the governmental actions challenged as being individualized assessments are ***administrative*** in nature—usually, a special land use permit or some other request for approval of a particular building development proposal specific to a property and a user. These discrete or site-specific discretionary decisions do not make policy, but rather implement it. Rezonings of property, on the other hand, involve ***legislative action that sets policy*** for the community as a whole, and they have no place in the category of individualized assessments as contemplated under RLUIPA.

In fact, the only RLUIPA cases found in which a denial of a legislative rezoning was an issue are *San Jose Christian College v City of Morgan Hill*, 360 F 3d 1024, 1035 (CA 9, 2004) and *Sts. Constantine & Helen Greek Orthodox Church v New Berlin*, 396 F3d 895 (CA 7, 2005). The RLUIPA claim in *San Jose v Christian College* was not based on the City's decision to deny a rezoning on its merits. Rather, the city denied the college's application on *procedural grounds* because of a failure to submit a complete rezoning application. The court acknowledged that the evaluation of whether the application was complete was to some extent an individualized assessment, but concluded that, "[s]hould College comply with this request (for a complete

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case); and, *see, also*, *Westchester Day School v Village of Mamaroneck*, 417 F Supp 2d 477 (SD NY, 2006) (denial of special permit).

application), it is not at all apparent that its rezoning application will be denied."[65] In *New Berlin*, there was an initial application for rezoning that was later replaced by an application for approval of a specific development plan for a particular church building, which thus became an individualized review.

Legislative action by a city in establishing and amending zoning use districts—to a great degree directed to the protection of the jealously guarded single-family neighborhood—is at the very heart of a city's general policy-making efforts to protect the quality of life for its residents. In *Village of Belle Terre v Boraas*, 416 US 1, 13; 94 S Ct 1536; 39 L Ed 2d 797 (1974), Justice Marshall, even while dissenting with regard to the effect of a particular single-family zoning regulation in the village ordinance, made the following oft-cited observation with regard to the zoning power:

> "It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life. I therefore continue to adhere to the principle of *Village of Euclid v Ambler Realty Co*, 272 US 365, 47 S Ct 114, 71 L Ed 303 (1926), that deference should be given to governmental judgments concerning proper land-use allocation."

See also, *Village of Euclid v Ambler Realty Co, supra*; *Brae Burn, Inc v Bloomfield Hills*, 350 Mich 425; 86 NW2d 166 (1957).[66]



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[65] *San Jose Christian College, supra* at 1035.

[66] This Court has specifically recognized that, given the inter-relationship between and among uses of land, weakening the right of a municipality to regulate a particular type of land use within its borders erodes the efficacy of zoning in the balance of the community. *Hess v West Bloomfield Township*, 439 Mich 550; 486 NW2d 628 (1992). The process of enacting and implementing zoning regulations by locally-elected officials—with extensive planning study and review, and public hearings to ensure citizen oversight and input—has long and consistently been recognized by the U. S. Supreme Court to be a well-justified, traditional exercise of state authority. See, e.g., *Hess v Port Authority Trans-Hudson Corp.*, 513 US 30 (1994) and *Solid Waste Agency of N. Cook County v United States Army Corp of Engineers*, 531 US 159; 121 S Ct 675; 148 L Ed 2d 576 (2001) (regulation of land use is a function traditionally performed by local government) and *Federal Energy Regulatory Commission v Mississippi*, 456 US 742, 767 n 30; 102 S Ct 2126; 72 L Ed 2d 532 (1982) ("regulation of land use is perhaps the quintessential state activity").

An examination of the Michigan zoning enabling act applicable to cities and villages at the time this case was litigated below confirms that the authorized method of exercising the zoning power involves a plan for ***dividing of the community into use districts***. The language of the zoning enabling act, MCL 125.581, reads as follows, in relevant part:

> "The legislative body of a city or village may regulate and restrict the use of land and structures; to meet the needs of the state's residents for food, fiber, energy and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land; to insure that uses of the land shall be situated in appropriate locations and relationships; to limit the inappropriate overcrowding of land and congestion of population and transportation systems and other public facilities; to facilitate adequate and efficient provision for transportation systems, sewage disposal, water, energy, education, recreation, and other public service and facility needs; and to promote public health, safety, and welfare, ***and for those purposes may divide a city or village into districts of the number, shape, and area considered best suited to carry out this section***." [*Emphasis supplied*]. [67]

Only a local legislature has the authority to set uses of land by district. "[I]t is settled law in Michigan that the zoning and rezoning of property are ***legislative functions***." *Arthur Land Co, LLC v Otsego County*, 249 Mich App 650; 645 NW2d 50 (2002) (emphasis added). In reversing a circuit court's conclusion that a rezoning denial should be treated as an "appeal" from an "administrative decision" under the constitutional "competent, material, and substantial evidence" standard, the Court of Appeals in *Arthur* emphasized the legislative nature of the action:

> "Because in denying plaintiff's request to rezone, the county board of commissioners acted as a legislative, as opposed to administrative, body, the trial court's decision in this regard was error. Were this an appeal from an administrative body, the trial court would have been limited to a determination whether the decision was authorized by law and supported by competent, material, and substantial evidence on the record. ***However, because rezoning is a legislative act, its validity***

[67] Recodified in Section 201 of Act 110 of the Public Acts of 2006, effective July 1, 2006, as part of a combined act regulating cities, villages, townships, and counties. MCL 125.3201.

> ***and the validity of a refusal to rezone are governed by the tests which we ordinarily apply to legislation.***" [*Emphasis added.*][68]

Significantly, when a property owner seeks a rezoning, and then challenges a denial of that request, the test to be applied in Michigan to resolve the challenge is not whether the municipality made adequate findings so as to distinguish one individualized action from another, or whether it failed to make the correct decision on the proposed new classification. Rather, a court's review will focus on the validity and constitutionality of the ***existing, legislatively-established*** zoning classification.[69] *Brae Burn, Inc v Bloomfield Hills*, 350 Mich 425; 86 NW2d 166 (1957).[70]

In the process of exercising its zoning authority, a city must first set about to comprehensively plan the entire community so as to protect the public health, safety, and welfare of its residents. In the absence of an overall plan, legal consequences in varying degrees from state to state are applicable.[71]

In Michigan, the Municipal Planning Act, MCL 125.31, *et seq.*, establishes a detailed set of standards for planning a city. These standards require a comprehensive analysis, leading inexorably to the conclusion that a zoning or rezoning decision cannot be made solely with reference to one individualized property. Each part of the city must be planned and zoned taking into consideration



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[68] This is the majority view in the country. The Oregon Supreme Court's decision in *Fasano v Bd of County Comm'rs*, 264 Or 574, 507 P2d 23 (1973), is often cited as the lead case departing from this majority view. In that case, the Oregon Court held that the action of rezoning of a single parcel represents *quasi-judicial* action.

[69] *Kirk v Tyrone Twp*, 398 Mich 429, 434; 247 NW2d 848 (1976); *Kropf v City of Sterling Heights*, 391 Mich 139; 215 NW2d 179 (1974)

[70] Borrowing from an analysis with regard to whether the right of referendum would apply in a given instance, and relying on *Schwartz v Flint*, 426 Mich 295, 307-308; 395 NW2d 678 (1986), it was pointed out in *Green Oak Township v Munzel*, 255 Mich App 235, 240-241; 708 NW2d 756 (2003), that:

> ". . . the right of referendum is applicable to *zoning ordinances* only. We emphasize that the Legislature expressly refers to the word "ordinance" to the exclusion of other types of zoning actions including variances, exceptions, and special use permits. In our view, the term "ordinance" has a particularized meaning when used with reference to the TRZA. Specifically, the enactment of a zoning ordinance is considered a "**distinct legislative act.**" 8 McQuillin, Municipal Corporations (3d ed.), §25.52, p. 163; . . .." (*Emphasis supplied.*)

[71] See, Sullivan, *The Role of the Comprehensive Plan*, 31 Urb Law 915 (1999).

the community as a whole, ensuring that each part of the city fits compatibly into the overall plan. Thus, city zoning and planning, even with respect to a single parcel of land, *a priori* represents the ***very antithesis*** of an individualized assessment, and requires consideration of many interrelated aspects of the community.[72]

To be sure, there are plenty of decisions under a zoning ordinance "system" that qualify as individualized assessments—the issuance of zoning violation tickets, an action on a zoning variance request, an action on a request for a determination that a specific site plan meets the requirements of the ordinance. These are the ***administrative*** decisions that officials and commissions make every day in the implementation of zoning ordinances.[73] They carry out the legislatively-established policy of the city council. Within this administrative context, there are frequently systems for exempting a proposal from one or more specifications, and there is corresponding authority for the establishment of conditions to ensure compatibility, and the like, when an exemption is granted.[74]

By contrast, a determination to zone property to a particular classification (or to re-zone it to a new classification) addresses not a particular use or user, but a ***whole list of potential uses and users*** in context with a neighborhood or area of the community, and in context with the community at large. Each zoning district has a laundry list of permitted uses—e.g., a multiple-family district might permit duplexes, churches, attached condominiums, apartments, and townhouses; a commercial district might allow retail buildings, offices, and mixed uses. The legislative body, in



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[72] See *Hess*, *supra* at 562-564.

[73] See *Grace United Methodist Church v City Of Cheyenne*, 2005 US App Lexis 23013 (2005).

[74] See, e.g., MCL 125.584d(5), which provides in part that, "A site plan shall be approved if it contains the information required by the zoning ordinance and is in compliance with the zoning ordinance and the conditions imposed . . ." *See,* also, *Konikov v Orange County*, 410 F3d 1317 (CA 11, 2005) (a RLUIPA claim challenging the enforcement of a special exception process satisfied the act's "individualized assessments" test, because the process of determining whether a gathering is a "religious organization" under the local law runs the risk that standards in the regulations would be enforced in unequal fashion"; *Cottonwood Christian Center v Cypress Redevelopment Agency*, 218 F Supp 2d 1203 (CD Cal 2002) (denial of conditional use permit "invite[d] individualized assessments of the subject property and the owner's use of such property); and *Shepherd Montessori Center Milan v Ann Arbor Charter Twp*, 259 Mich App 315; 675 NW2d 271 (2003) (variance process under zoning ordinance invites individualized assessment).

determining whether to grant a zoning ordinance amendment to alter a zoning district, must evaluate all potential uses in that district, and must also look at all the possible or potential uses in other districts that may have interaction with the property sought to be reclassified.

Put simply, the legislative enactment of zoning or rezoning ***creates the policy for the "system"*** of regulation; once created, the administrative actions of officials must then implement that system. It is thus critical to understand that, as with many policy decisions, once the zoning policy is set in terms of a particular district, those who are governed by it come to rely upon it. In *Raabe v City of Walker*, 383 Mich 165, 177-178; 174 NW2d 789 (1970), quoting from McQuillin, Municipal Corporations (1965 Rev. Vol. 8, §§25.06 and 25.68), this Court clarified an extremely important proposition in this context:

> "Since the purpose of zoning is stabilization of existing conditions subject to an orderly development and improvement of a zoned area and since ***property may be purchased and uses undertaken in reliance on an existing zoning ordinance***, an amendatory, subsequent or repealing zoning ordinance must clearly be related to the accomplishment of a proper purpose within the police power. Amendments should be made with utmost ***caution and only when required by changing conditions; otherwise, the very purpose of zoning will be destroyed.***" [Emphasis added.]

In this case, as reflected in the testimony of the City's planning witnesses, the policy determination whether to insert GBW's proposed multiple-family zoning district into the heart of a stable single-family residential neighborhood by necessity drew upon the comprehensive plan for the City, an evaluation of the character of the neighborhood in which the property is situated, and myriad other factors required in the zoning and planning acts and associated principles.[75] It was a policy decision that was ***not individualized as to GBW***.

The legislative zoning decision at issue in this case could not, as a matter of law, amount to an individualized assessment as that term was intended by the Congress in RLUIPA. The trial court

should therefore not have granted summary disposition to GBW on this issue, and the Court of Appeals' affirmance of that ruling should be reversed.

**II. Plaintiff GBW alleges that the City's decision not to enact legislation changing the zoning of the GBW's property from a single-family classification to a multiple-family classification resulted in a substantial burden on the GBW's religious exercise, because it prevented the GBW from establishing a housing project on the property. If an ordinance is facially neutral, and imposes no greater burden on a religious user than it would on a non-religious user, the denial cannot rise to the level of a substantial burden under RLUIPA.**

Subsection (a)(2)(c) of RLUIPA states in full:

> No government shall impose or implement the land use regulation in a manner that imposes a ***substantial burden*** on the ***religious exercise*** of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly or institution:
>
> (A) Is in furtherance of a ***compelling governmental interest***; and
> (B) Is the ***least restrictive means*** of furthering that compelling governmental interest.

The only evidentiary hearing in the trial court was on the compelling interest question. The trial court should never have reached that issue, however, because GBW failed to provide any evidence that its proposal (such as it was) to provide for-rent apartment-type housing to a broad market of tenants rose to the level of a religious exercise, or that the burden imposed by GBW's inability to build such a multiple-family development under the existing single-family zoning classification was substantial as required under RLUIPA. At the very least, the trial court erred by deciding those two issues in GBW's favor on summary disposition without a hearing.

[75] Appellant's Appendix, 470a-592a.

### 1. *Building an Apartment Complex and Charging Rent to Anyone Who Wants to Live There is a Commercial Endeavor, Not the Exercise of Religion.*

Under RLUIPA, "religious exercise" includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[76] RLUIPA also specifically provides that "the use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use a property for that purpose."[77] The Court of Appeals in this case read these two provisions to mean that the housing project, as a proposed use of real property, was a religious exercise essentially by definition. That reading is not supported by either the language of RLUIPA or the case law on which it relies.[78]

As noted above, the trial court found on summary disposition, as a matter of law, that the building of a multiple-family apartment complex was part of GBW's religious mission and therefore was the exercise of religion. Yet, there were no proposed plans filed with the complaint or included in the summary disposition materials. None were produced for trial on the compelling interest issue. In fact, no evidence whatsoever was provided at any of those stages regarding what, exactly, the use would be.



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[76] 42 USC.2000cc-5(7)(A).

[77] 42 USC 2000cc-5(7)(B).

[78] Note that this purported "definition" of religious exercise is not so clearly a definition at all. The fact that it includes the term "religious exercise" makes it completely circular—which may in fact have been intentional, because the provisions referring to religious exercise were never intended to be a definition in the strict sense. While acknowledged to be a statement attributable only to the joint sponsors of the act, and thus not a statement of the Congress as a whole, the Joint Statement appended to RLUIPA (146 Cong. Rec. 7774 (July 27, 2000) reveals the following:

> Not every activity carried out by a religious entity or individual constitutes 'religious exercise.' In many cases, real property is used by religious institutions for purposes that are comparable to those carried out by other institutions. While recognizing that these activities or facilities that may be owned, sponsored, or operated by a religious institution, or may permit a religious institution to obtain additional funds to further its religious activities, this alone does not automatically bring these activities or facilities within the bill's definition or [sic] 'religious exercise.' ***For example, a burden on a commercial building, which is connected to religious exercise primarily by the fact that the proceeds from the building's operations would be used to support religious exercise, is not a substantial burden on 'religious exercise.'*** [*Emphasis added.*]

The affidavit of Reverend Combs, on which the trial court must necessarily have relied, gives no specifics about GBW's housing plans.[79] It says nothing about the size of the project. It says nothing about whether it will be charitable or for-profit, for market rent or for free, for church members only or for everyone. It says nothing about how, exactly, the apartment units will be connected with GBW in any way, shape, or form. It says nothing, in short, that actually confirms that GBW does not plan to operate this project just like any other commercial endeavor.[80]

What is instructive on this point, though, is just how non-committal Rev. Combs was when pressed about the proposed housing use. He was not sure it will be 32 units.[81] He was not certain that GBW will ask for tax-exempt status.[82] He did not, at the end of the day, even commit GBW to limiting the use to assisted living for the elderly or disabled.[83] In fact, he alluded to other similar developments that appear to have been sold to other unnamed parties.[84] The court order finding a violation of RLUIPA that ultimately resulted from the compelling interest hearing has no limitation on it whatsoever with regard to the actual use of the property for religious purposes.[85]

The City does not suggest that the "religious exercise" phrase be read narrowly to include only religious worship. Certainly, the concept has been extended to other ancillary uses, like schools run by religious entities and even day care centers, under both RLUIPA and the constitutional Free

[79] Appellant's Appendix, 153a12.
[80] Because the trial court granted summary disposition to GBW as to the religious exercise/substantial burden issue, the trial court hearing on whether the City had a "compelling interest" in the existing zoning regulations did not directly or fully address this issue.
[81] Appellant's Appendix, 651a, 670a-671a.
[82] Appellant's Appendix, 689a-691a.
[83] Appellant's Appendix, 686a-690a.
[84] Appellant's Appendix, 651a.
[85] Appellant's Appendix, 853a1.

Exercise provisions on which it is based.[86] But other cases have clearly held that the mere involvement of a religious institution does not guarantee a finding that the use is in fact "religious."[87]

Nor does this case raise the questions that have bogged down other courts in discussing the "religious exercise" provisions of RLUIPA—that is, whether the activity at issue must be "compelled by, or central to, a system of religious beliefs" and whether those beliefs must be "sincere." Under Free Exercise/Establishment Clause case law, such showings are required,[88] while RLUIPA seems to state in the "definition" sentence quoted above that neither must be shown. Where GBW and the lower courts fall short is not so much on the question whether the project is compelled by or central to GBW's system of beliefs, sincere or not, but rather on the more fundamental question of just how this development relates to the exercise of religion so as to make it different from any similar commercial endeavor.

The "mission statement" on GBW's letterhead, to which both lower courts referred, does list "housing" as one of its goals. The other two things it lists are "employment" and "consulting." Under the lower courts' logic, it would appear that GBW's use of its newly-acquired property in this single-family subdivision to build a manufacturing plant to provide local jobs, or an office building from which it could provide professional consulting services, would qualify as a "religious exercise."

There was no basis to conclude on the facts of this case as presented below that the proposed use is anything other than a commercial apartment complex. Physically, the buildings will be just bricks and mortar, easily convertible to a secular commercial housing use, which is relevant given

[86] See, e.g., *Shepherd Montessori Center v Ann Arbor Charter Twp*, 259 Mich App 315; 675 NW2d 271 (2003); *Richmond Heights v Richmond Heights Presbyterian Church*, 764 SW2d 647 (MO, 1989).
[87] See, e.g., *Grace United Methodist Church v City of Cheyenne*, 427 F3d 775 (CA 10, 2005) (day care); and *Diocese of Buffalo v Buczkowski*, 446 NYS 2d 1015 (1982), aff'd 456 NYS 2d 909 (1982) (home for the disabled). See also, *Mt. Elliott Cemetery Assn v City of Troy*, 171 F3d 398, 403-404 (CA 6, 1999).
[88] See, e.g., *Grace United Methodist Church v City of Cheyenne*, 2006 US App Lexis 15182 (6/20/06).

that GBW was unwilling to commit during the trial to a specific church-based use of the property and the trial court's order imposes no such requirement. The many neighbors who purchased their properties in reliance on a stable single-family residential neighborhood will, in the end, be left with a 32-unit apartment project that will, regardless of who "sponsors" it, be just another apartment complex destabilizing yet another residential neighborhood.[89] None of the "protections" that Reverend Combs testified to—the network of caregivers, the overseeing social and charitable organizations—were ever "married" by the evidence to this rezoning, and therefore they have no legal relevance.

RLUIPA cannot be read to compel the City to enact legislation allowing a commercial multiple-family project in a single-family neighborhood just because the proponent is a church. The trial court's grant of summary disposition to GBW on this issue should therefore be reversed.



### 2. *There Was in Any Event No Substantial Burden on GBW's Exercise of Religion Caused by The Denial of the Rezoning Application.*

For both lower courts, the finding that the housing project, however unspecific, constituted the exercise of religion necessarily required the conclusion that the denial of rezoning to allow the use imposed a substantial burden, simply because it prevented GBW from building the project. This analysis makes the substantial burden test little more than an inquiry into whether the regulation has ***any*** effect on the proposed use. There is no constitutional or logical basis for such a broad expansion of the concept of substantial burden.

#### a. The Substantial Burden Test

As explained above, RLUIPA's substantial burden language stems from pre-RLUIPA Free Exercise/Establishment Clause cases such as *Sherbert* and *Lyng*. These cases stand for the

[89] For that reason alone this case is distinguishable from the only case really cited by either lower court on this issue, *Jesus Center v Farmington Hills*, 215 Mich App 54; 544 NW2d 698 (1996), in which no physical improvements of any

proposition that, even when greater or heightened scrutiny is imposed by virtue of the apparent impact of a regulation or prohibition on a religious use or activity, there is no First Amendment violation unless the regulation or prohibition would coerce activity "inconsistent with" a religious belief or "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens."[90]

With no direct U.S. Supreme Court authority interpreting RLUIPA in the land use context, other applications bear consideration. Judge Posner's decision in the Seventh Circuit's *CLUB*, *supra*, stands as perhaps the best explanation of the substantial burden test under RLUIPA, as read in the context of the Free Exercise/Establishment Clause cases from which the test emanates. In *CLUB*, an association of churches challenged under RLUIPA a City of Chicago zoning ordinance that allowed churches as a matter of right in residential zones but required them to obtain special use permits in other zones. Judge Posner noted that, under RLUIPA, the definition of "religious exercise" has been expanded to include the use and building of real property, and concluded that the standard for what constitutes a substantial burden on religious exercise even in the land use context is to be determined by reference to preceding jurisprudence.[91]

*CLUB* began its analysis with a reference to an earlier RFRA case in which the court had held that a substantial burden is one that "forces adherents of a religion to refrain from religiously-motivated conduct, inhibits or restrains conduct or expression, . . . or compels conduct or expression that is contrary" to the adherents' religious beliefs.[92] The court was concerned, however, that this test might no longer be appropriate under RLUIPA because, given the broad statement of what constituted "religious exercise" in RLUIPA, "the slightest obstacle incidental to the regulation of

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kind were required to be made to the church's existing building in order to accommodate the sheltering of the homeless. It would be no great solace to the neighbors of the apartment project that it was once owned and operated by a church.

[90] *Lyng*, *supra* at 449.

[91] *Id.* at 760-61 (citing 146 Cong. Rec. 7774-01, 7776 [July 27, 2000]).

land use—however minor the burden it would impose"—could be found to be substantial.[93] The court thus concluded that the proper test for whether a ***land use*** regulation imposes a substantial burden on religious exercise should instead be whether it "necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—effectively impracticable."[94]

The *CLUB* court recognized that the challenged city ordinances "may contribute to the ordinary difficulties associated with" compliance with land use regulation, including the scarcity of land in permissible zones and the "costs, procedural requirements, and inherent political aspects" of the approval process. The court also specifically recognized the "considerable time and money" expended by the applicants in that case in successfully locating within the city.[95]

Yet, the court still concluded that the ordinances did ***not*** impose a substantial burden on religious exercise, because they "did not render impracticable the use of real property in [the city] for religious exercise, much less discourage churches from locating or attempting to locate in [the city]."[96] The court explained that to conclude otherwise would be to "favor" religious exercise with an "outright exemption from land-use regulation. * * * ***No such free pass for religious land uses masquerades among the legitimate protections RLUIPA affords to religious exercise***."[97]

Other federal courts have found this logic persuasive. For example, in *Vineyard Christian Fellowship v Evanston*, 250 F Supp 2d 961 (ND Ill, 2003), a federal district court rejected a RLUIPA challenge to a city ordinance prohibiting churches in certain zones, including a business zone in which the church had purchased property. Although the church had "undoubtedly suffered serious

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[92] *Id.* at 761.
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.* at 762 (emphasis added).

hardships, first in its attempt to find a suitable property, and, once it found one * * * in attempting to win approval for the intended uses," the burden imposed by the ordinance nevertheless was not substantial.[98]

In *Midrash Sephardi, Inc v Town of Surfside,* 366 F3d 1214, 1227 (2004), *cert den* 125 S Ct 1295 (2005), the Eleventh Circuit determined that a requirement to apply for permission to construct a place of worship on property other than on the property that the church owned did not constitute a "substantial burden" as the court defined that term. The court determined RLUIPA's substantial burden required the following elements:

> [A] "substantial burden" must place more than an inconvenience on religious exercise; a "substantial burden" is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct.[99]

In *Konikov v Orange County,* 410 F3d 1317 (11th Cir, 2005) the Eleventh Circuit upheld as against a substantial burden challenge enforcement proceedings against a rabbi to prevent him from holding services at his home without securing a permit for such activity, applying the *Midrash* substantial burden test and in finding no violation:

> "The zoning ordinance at issue requires Konikov to apply to the Board of Zoning Adjustment for a special exception in order to operate a "religious organization." It does not prohibit Konikov from engaging in religious activity. Because application for a special exception ***does not coerce conformity of a religious adherent's behavior***, we hold that such an application requirement does not impose a substantial burden as defined by RLUIPA."[100] (*Emphasis added.*)

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[98] *Id.* at 991-92.

[99] Although the court found that the substantial burden test was not met, because the city code authorized private clubs and the like but not churches on the land the congregation owned, the governmental refusal to allow the church to be constructed on the land the congregation owned violated RLUIPA's "equal terms" provisions.

[100] Like *Midrash*, although it did not find a violation of the substantial burden test, the *Konikov* court did find an "equal terms" violation of RLUIPA (which is not at issue in this case).

Other recent examples of courts finding the substantial burden test not met under RLUIPA include *Sisters of St. Francis Health Services v Morgan County*, 397 F Supp 2d 1032 (SD Ind, 2005) (hospital not exempt from permit application requirement); *Grace United Methodist Church v City of Cheyenne*, 427 F3d 775 (CA 10, 2005) (zoning variance denial for day care not a substantial burden); *Vision Church v Village of Long Grove*, 397 F Supp 2d 917 (ND Ill, 2005) (size limitation on church building not a substantial burden); *Chase v City of Portsmouth*, US Dist Lexis 29551 (ED Va, 2005) (denial of permit to locate church not a substantial burden); *Jose Christian College v City of Morgan Hill, supra.* (requirement to file rezoning application not a substantial burden); *Corporation of the Presiding Bishop v City of West Linn,* 111 P 3d 1123; 338 Ore 453 (2005) (requirement to secure additional property and submit a new application was not a substantial burden); *Williams Island Synagogue, Inc v City of Aventura*, 358 F Supp 2d 1207 (2005) (denial of conditional use permit for new facility did not directly ***coerce*** conformity to a religious standard). [101]

At the state level, the only case other than the present case addressing the substantial burden test under RLUIPA is *Shepherd Montessori Center v Milan* 259 Mich App 315; 675 NW2d 271 (2003), in which the plaintiff applied for and was denied a permit to expand its religious day-care facility by adding a religious primary school. The Michigan Court of Appeals noted that, under United States Supreme Court jurisprudence, "for a governmental regulation to substantially burden religious activity, it must have a tendency to coerce individuals into acting contrary to their religious beliefs," and that, conversely, "a government regulation does not substantially burden religious activity when it only has an *incidental effect* that makes it more difficult to practice the religion." *Id.*

[101] Similar cases have been decided under the prior RFRA law. In *Christian Gospel Church v San Francisco*, 896 F2d 1221, 1224 (CA 9, 1990), the Ninth Circuit also found that denial of permit to establish church in residential neighborhood was not a substantial burden for the purpose of the Free Exercise Clause. Although the church asserted the importance of "home worship" and insulation from commercial environments, it previously had worshiped in the banquet room of a hotel. The government's action therefore did not restrict current practice but merely prevented a change in practice.

at 315 (citing *Lyng*, *supra* at 450-51). ". . . mere inconvenience to the religious institution or adherent is insufficient."[102]

**b. The Lower Courts' Application of the Test**

As noted above, the trial court's opinion on the pivotal and contested issue of substantial burden—which, again, it resolved by way of summary disposition, without an evidentiary hearing—was essentially that there were "obvious financial, logistic, and organizational advantages to having the apartments in close proximity to the main church building," and that these would be lost if the rezoning were not granted.[103] Since there were no other properties listed for sale in that area, the trial court found, the burden was substantial, not incidental.[104]

The Court of Appeals' opinion is somewhat more detailed, but similarly conclusory: the housing use was part of GBW's religious exercise, and thus the mere fact that the City denied use of the property for that purpose "constitutes a requisite substantial burden." The appellate court went on to state that "the evidence"[105] indicated that building single-family homes on the property "would not be economically feasible as an alternative ***for Plaintiff***."[106] (Emphasis added.) The court summed up its position by stating that, because there is no multiple-family zoned property available near GBW, GBW would likely have to forego developing the project at all, and therefore the City's "implementation" of the current single-family zoning ordinance "would, in effect, compel inaction with respect to GBW's sincerely held religious belief."[107]

[102] *Id.* citing *Werner v McCotter*, 49 F3d 1476, 1479 n 1 (CA 10, 2004).
[103] Appellant's Appendix, 380a.
[104] *Id.*
[105] It is not clear whether the Court of Appeals meant the evidence on summary disposition or at the limited hearing that took place on the compelling interest standard.
[106] Appellant's Appendix, 943a.
[107] *Id.*

### c. There was no substantial burden on GBW in this case

Even assuming that building and owning an apartment building is religious exercise, GBW still failed to show—certainly at the summary disposition stage but even later at trial—that the City's refusal to rezone the property to allow construction of an apartment building for senior citizens or the handicapped would "coerce" GBW or its members into acting inconsistently with their beliefs, or that it would be more than an inconvenience or a burden different in kind than a commercial developer of apartment buildings for such use might face.

GBW assembled the land apparently over a period of time knowing full well the single-family character of the property, and most likely understanding that a multiple-family use of the property would not be permitted under the City's ordinance.[108] If the concept of substantial burden means anything, it should not include an economic burden caused by a poor investment choice that was dependent upon the enactment of City legislation to make the investment "pay off."

Nor did GBW really make any kind of effort to establish—either at the summary disposition stage or at the subsequent hearing on compelling interest—exactly what the economic burden of locating elsewhere would be. Reverend Combs' affidavit mentions that the property could not be sold at a reasonable price, or could not be developed with single-family homes.[109] Yet no ***evidence*** was placed before the court to support that statement. Moreover, even assuming these conclusory statements to be true, the substantial burden test does not guarantee religious uses some minimum rate of return on potential investments. RLUIPA is not intended to make the City of Jackson an "insurer" of GBW's success in its real estate development endeavors; RLUIPA is not intended to favor real estate development by churches over the same development by non-religious applicants.

[108] Appellant's Appendix, 593a-597a.
[109] Appellant's Appendix, 153a12.

As for the contention that there is "no land available" zoned for multiple-family use, or that the land available is not adjacent to GBW, this is essentially the same "inconvenience" argument that the churches made in *CLUB*, *Midrash Shepardi*, and other similar cases. Land is always available at some price. RLUIPA does not spare religious users from having to enter the marketplace to secure property for its religious purposes. The current zoning or land use "regulation" at issue—the existing single-family zoning classification of the subject property—is one of the "ordinary difficulties" associated with finding a location for a housing development that any person, business, or other entity would have to deal with.

As the district court in *Petra Presbyterian Church v Village of Northbrook*, 409 F Supp 2d 1001, 1007 (ND Ill, 2005), aptly put it, quoting *CLUB*, *supra*, "scarcity of land in urban areas does not require [a] municipality to 'favor [churches] in the form of an outright exemption of land-use regulations.'" Or somewhat more tersely-put, "RLUIPA does not grant churches a blanket exemption for zoning laws, after all." *Sisters of St. Francis v Morgan County*, 397 F Supp 2d 1032, 1051; (SD Ind, 2005). This case fits squarely into the analysis of the Seventh Circuit in a pre-RLUIPA case in which it concluded that "whatever specific difficulties [the church] claims to have encountered, they are the same ones that face all [land users], not merely churches. The harsh reality of the marketplace sometimes dictates that certain facilities are not available to those who desire them." *Love Church v City of Evanston*, 896 F2d 1082, 1086 (CA 7, 1990).

There was no evidence in the record below, either at the summary disposition stage or at trial, that building a multiple-family apartment complex on ***this particular*** assemblage of property adjacent to the worship center of Greater Bible Way Temple is intimately related to the religious tenets of GBW such that its inability to do so causes it to violate its beliefs, or coerces it in any way, or even requires it to forego its religious precepts. If nothing else is clear from Reverend Combs'

testimony at trial, the fact that GBW has been able to provide housing and related services throughout the City, and elsewhere in the state through related entities, is apparent. ***This*** property—some of which was apparently acquired originally for parking lot purposes to serve GBW's existing building—is not essential or central to GBW's mission to provide services.[110]

The neutral regulations applicable to all owners of property in the R-1 single-family neighborhood in question predated GBW's acquisition. The ordinance does allow the requested use—just not where GBW wants it. RLUIPA does not grant GBW the right to build a multiple-family apartment complex wherever it pleases, on property that was not planned for such a use and was not zoned for such a use when purchased.

The City's refusal to re-zone scarce single-family residential land was not "coercive," nor did it "put substantial pressure on an adherent to modify [its] behavior and to violate his [its] beliefs."[111] This Court should reverse the trial court's grant of summary disposition for GBW on this issue. At the very least, the City was entitled to a trial on this most fundamental issue under RLUIPA.



### III. The City's decision not to enact legislation changing the single-family classification of the GBW's property to a multiple-family classification furthered the City's interests in protecting a stable neighborhood and fostering single-family home ownership in established neighborhoods. The protection of existing neighborhoods is a legitimate zoning and planning interest and a compelling governmental interest under RLUIPA.

The Court of Appeals literally scoffs at the City's assertion that, even if the land use regulations at issue are found to be a substantial burden on GBW's religious exercise, the City has a compelling interest in maintaining the single-family regulations on the property. As it would in

[110] The lower courts' reliance on *Jesus Center*, *supra*, for determining the religious nature of the use is entirely misplaced. In that case, the Center sought to provide, within the same building in which it conducted its traditional worship services, shelter service to the poor and homeless. That proposed use of an existing facility was neither unusual nor inconsistent with religious uses that have been made of other properties. No physical improvements to the worship building, for example, were at issue.

[111] See, *Thomas*, *supra* at 717-18.

connection with any other rezoning request, the City carefully laid out the reasons why legislatively changing the zoning on the property to the multiple-family classification would not result in an appropriate use of the property: potential adverse traffic consequences on parking in the area; population density; loss of land for single-family housing; management of sprawl; inadequacy of on-site parking for multiple-family use.[112]

For the Court of Appeals, these concerns are apparently nothing more than facts that it can weigh in making a kind of "preponderance of the evidence" inquiry. In dismissing each of them, the court unabashedly substitutes its judgment for that of the duly-elected legislative body of the City. It does so with no discussion whatsoever of zoning or planning law, the police power authority, or the deference courts normally pay to the exercise of a city's legislative authority—and to the interests of adjacent residents who relied on the continued existence of the single-family neighborhood where they built and invested and where they live.

Like the religious exercise and substantial burden elements of RLUIPA, the concepts of compelling governmental interest and least restrictive means find their source in First Amendment case law. Compelling interests are "paramount" interests. *Sherbert*, *supra* at 406. The government's asserted compelling interest must be real, not hypothetical, and it must be serious. *City of Renton v Playtime Theaters*, 475 US 41, 51; 106 S Ct 925; 89 L Ed 2d 29 (1986). The least restrictive means test requires a regulation to be narrowly drawn to further the alleged governmental interest. *Shad v Borough of Mt. Ephram*, 452 US 61, 68; 101 S Ct 2176; 68 L Ed 296 71 (1981):

> [W]hen a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest. Even where a challenged regulation restricts freedom of expression only incidentally or only in a small number of cases, we have scrutinized the governmental interest furthered by the regulation and have stated that the regulation must be narrowly drawn to avoid unnecessary intrusion on freedom of expression.

[112] Appellant's Appendix, 22a.

Achieving the goals of a local government's land use regulatory scheme through its zoning ordinance has in fact been found to be a compelling governmental interest in the context of RLUIPA.[113]

*Village of Euclid*, *supra*, is often cited as the seminal case upholding the concept of zoning generally, and specifically the idea that local governments have the police power authority to pass laws for the protection of single-family areas

> ...on the ground that in neighborhoods of single-family homes, apartments 'come very near to being nuisances' by 'interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which would otherwise fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, ...thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored locations -- until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. [Rathkopf's *The Law of Zoning and Planning*, § 23:2, p 23-7.]

This Court "adopted" *Euclid* in *Austin v Older*, 283 Mich 667 (1938), and later confirmed its commitment to the preservation of single-family neighborhoods in *Kropf* v *City of Sterling Heights*, 391 Mich 139, 159; 215 NW2d 179 (1974), stating that "[w]hen First Amendment rights are being restricted we require the State to justify its legislation by a 'compelling' State interest. With regard to zoning ordinances, we only ask that they be 'reasonable.' And, as we have stated, they are presumed to be so until the plaintiff shows differently."[114]

Some 80 years after *Euclid*, single-family neighborhoods are still critical to the health of any city. The State of Michigan recently published Michigan Land, Michigan's Future: Final Report of

[113] See, *Konikov*, 302 F Supp 2d 1328, 1343 (MD Fla 2004), aff'd in pt 410 F3d 1317 (CA 11, 2005); *Elsinore*, *supra* at 1093-95.
[114] *Id.* at 158.

the Michigan Land Use Leadership Council (August 15, 2003). The report documents the concerns of city revitalization and the associated urban sprawl issues. Specifically, it states:

> Also critical is the effect that land use patterns have on cities. When investment shifts from cities to the suburbs and beyond, (1) city property values decline; (2) city populations dwindles, leaving behind a concentration of older, minority, and/or low-income populations who often cannot afford to move out; (3) the city's tax base shrinks; and (4) the city's roads, sewers, buildings, police and fire service, and public institutions deteriorate.[115]

This is what Jackson seeks to avoid. Its main tools for doing so are its Land Use Plan and its zoning ordinance—rendered all but irrelevant by the lower courts' reckoning.

In this case, the trial testimony supported the City's long-term and hard-fought efforts to preserve its single-family neighborhoods. Three witnesses testified about the City's objectives of promoting home ownership, and that people were leaving the community because of other home ownership opportunities elsewhere.[116] Others testified that the City encouraged GBW to work toward finding an appropriate R-3 location in the City for its project, relying on planning staff recommendations that the request would significantly change the character of the single-family neighborhood, that there was already expansion by GBW that had developed an institutionalized character to the neighborhood, that multiple-family residential use was not supported by the 1988 land use plan, and that the requisite streets were not designed to accommodate the traffic increase.[117]

These are, indeed, compelling interests on the part of the City, and the proposal to change the zoning on the subject property was clearly inconsistent with those interests. Nor was there some "less restrictive" way to further those interests than by denying the request. The ***only*** issue before

[115] Final Report, p 14.
[116] Appellant's Appendix, 603a-630a.
[117] Appellant's Appendix, 21a.

the City was the request for legislative action—not a use variance, not special land use permit, not a planned unit development; just the request to pass an ordinance amendment. [118]

The U.S. Supreme Court has emphasized that federal legislation should not encroach into areas that are within the traditional ambit of state and local control.[119] It is difficult to imagine an intrusion more substantial than that authorized by the lower courts in this case. The existing single-family zoning classification is narrowly-drawn and facially-neutral, and the denial of the new classification was similarly framed as a review of all permitted uses in the proposed district.

The Court should reverse the determination of the lower courts that the City's interest in protecting single-family neighborhoods through its zoning ordinance is, essentially, irrelevant as a result of RLUIPA.

## IV. The lower courts concluded that an "individualized assessment" includes the legislative act of amending a zoning district map, and that the denial of a rezoning to build an apartment complex on subdivision lots in the middle of a single-family residential neighborhood is a "substantial burden." When read that broadly, RLUIPA is unconstitutional because it exceeds the scope of Section 5 of the Fourteenth Amendment and because it constitutes the establishment of religion.

For an exercise of Congress' Section 5 power to be constitutional in the context of providing ***additional*** constitutional rights, two conditions must be met: (1) Congress must identify a "widespread and persisting deprivation of constitutional rights" that it is acting to remedy or deter; and (2) there must be a "congruence and proportionality between the injury to be prevented or

[118] Indeed, the Court of Appeals' reference in its opinion to a proposed "compromise" proposal of less than 32 units was frankly inappropriate. No such plan was ever introduced into evidence at any point in the lower court proceedings. ***All*** of the various plans that GBW has referred to over the course of the case are speculative and irrelevant, since none of them are in evidence.

[119] *United States v Lopez* 514 US 549, 561; 115 S Ct 1624; 131 L Ed 2d 626 (1995); *United States v Morrison*, 529 US 598, 617-618; 120 S Ct 1740; 146 L Ed 2d 658 (2000).

remedied and the means adopted to that end.[120] Neither test is met in the land use context of RLUIPA as applied by the lower courts.

Despite Congress' unusually assiduous attempt to create a legislative "record" showing discrimination against religious entities, uses, or activities on a national basis, the record behind RLUIPA provides no real evidence or proof that religious uses or users have been a regular target of discrimination in local land use decisions.[121]

Even with the "great deference" to be paid to Congress' fact-finding powers (see, e.g., *Elsinore Christian Center, supra* at 1180), the fact remains that the record turns out to be, when all is said and done, really a reference to a small number of anecdotal instances that ought not be sufficient to accomplish such a sea-change in the law, and should be seen as an insufficient basis to find the "widespread deprivation of rights" and thus to confer an effective immunity from land use regulation on religious uses.

By defining "individualized assessments" to include even legislative actions by a local city council, and then concluding that the mere denial of that proposed legislative action satisfies RLUIPA's "substantial burden," the lower courts have effectively concluded that a church's *status* as a religious institution entitles it to strict scrutiny review of any governmental action restricting its religious use of land, regardless of the degree to which that action fails to take account of religious hardship, or relates to or impinges upon the church's central religious beliefs or omissions.

Nor is there "congruence" to the lower courts' analysis. At least one court has held RLUIPA to be unconstitutional as a violation of Congress' Section 5 powers because of the sweeping nature

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[120] *Boerne*, supra at 519-520. See, also, *Board of Trustees v Garrett*, 531 US 356; 121 S Ct 955; 148 L Ed 2d 866 (2001).

[121] See, e.g., Marci A. Hamilton, *Federalism in the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 Ind. L.J., 311, 324 (2003); Mark Chaves and William Tsitsos, *Are Congregations Constrained by Government? Empirical Results from the National Congregation Study*, 42 J. Church and St., 335, 337 (2000); and Ada-Marie Walsh, *Religious Land Use and Institutionalized Persons Act of 2000: Unconstitutional and Unnecessary,* 10 Wm. and Mary Bill of Rights, J. 189 (2001).

of the changes it would accomplish if construed as something more than a codification of existing constitutional rights. *Elsinore Christian Center, supra,* concluded that RLUIPA far exceeded what would be necessary for a merely prophylactic law tailored to remedy specific constitutional violations. The court noted that the compelling governmental interest test is the "single most searching standard of judicial inquiry and one historically reserved for restrictions on the core exercise of fundamental constitutional rights" and that a statute that applies it to nearly any land use decision involving religious entities employs a "blunderbuss" remedy far in excess of what would be called for to address particular instances of discrimination against religion—i.e., that it lacks "congruence and proportion."[122]

"A proper respect for both the Free Exercise and the Establishment Clause compels the State to pursue a course of 'neutrality' toward religion, favoring neither one religion over others nor religious adherents collectively over non-adherents."[123] If it imposes strict scrutiny review on even facially-neutral zoning laws of general applicability, with no evidence of even pre-textual discrimination, RLUIPA violates the Establishment Clause.[124]

The Supreme Court has adopted a three-part test to determine if a law is an unconstitutional establishment of religion. To be constitutional, the law at issue must (1) serve a secular legislative purpose; (2) have as its primary effect neither the advancement nor inhibition of religion; and (3) not foster an excessive governmental entanglement with religion. *Lemon v Kurtzman*, 403 US 602, 612-13; 91 S Ct 2105; 29 L Ed 2d 745 (1971). See also *Thornton, supra* at 708. A law is unconstitutional if it fails to satisfy any one of these three criteria.

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[122] *Id.* at 1102.
[123] *Board of Education v Grumet*, 512 US 687; 114 S Ct 2481; 129 L Ed 2d 546 (1994).
[124] See, *Thornton v Caldor*, 472 US 703, 709; 105 S Ct 2914; 86 L Ed 2d 557 (1985) (finding law giving employees right to take off Sabbath unconstitutional on grounds that religious concerns "automatically control" secular concerns of workplace).

Here, as applied by the lower courts, RLUIPA mandates a result that on its face—and really beyond serious argument—would not happen if the proposed user was not a religious entity. The use at issue, a for-rent apartment complex, is indistinguishable from any other commercial complex providing the same services in a secular setting. If it had to defend a denial of a re-zoning request for the same property and for the same apartment complex use, but brought by a secular entity, the City would do so on the basis that the existing zoning is reasonable and furthers legitimate governmental interests, and on the grounds that the property retains value as a single-family residential use. But now, following the Court of Appeals' published decision, merely by virtue of GBW's status as a religious entity that same legislative act (the denial of re-zoning) must be reviewed on a strict scrutiny basis under RLUIPA.

As RLUIPA is applied by the lower courts, this case hits all three *Lemon* standards on the head: an intention to further religion by changing the rules of the game to favor religious uses; by actually furthering of religion—the use at issue would clearly not be approved "but for" its sponsor being a religious entity; and by excessively "entangling" the legislative body in religion by requiring it to alter its analysis of the rezoning on the basis of the nature of the GBW in front of it. If that is RLUIPA's result, it is not constitutional.

## CONCLUSION AND RELIEF REQUESTED

RLUIPA "occupies a treacherous narrow zone between the Free Exercise clause, which seeks to assure that government does not interfere with the exercise of religion, and the Establishment Clause, which prohibits the government from [regulating religious exercise] in a manner that would express preference for one religion over another, or religion over irreligion."[125] By granting GBW unique privileges as a real estate developer and exempting its proposed apartment complex use—indistinguishable from a land use perspective from an apartment complex owned and operated by a

non-religious user—from a typical land use analysis, the lower courts strayed well outside that narrow area.

If analyzed as a Free Exercise/Establishment Clause case, this case would not survive summary disposition. A court discussing the Free Exercise Clause would recognize that, in asking for a legislative re-zoning of its property, GBW was not asking for an individualized assessment of its proposed use, but rather for a policy evaluation of that use in context with the community's comprehensive plan, the surrounding uses, and as one potential use among many that would be permitted. A court engaging in this traditional analysis also would not see the City's refusal to engage in the legislative action as affirmative, oppressive activity that substantially burdened GBW's right to conduct its religious activities, or caused it to choose between its beliefs and some other benefit.

It would take into consideration, for example, that the GBW in fact is already conducting religious activity in the single-family residential neighborhood within the City of Jackson at this very moment, and that it is doing so without any threat of retaliation or undue discrimination on the part of the City. This "substantial burden" analysis would recognize that the City is entitled to classify all land, including church land, under its zoning ordinance—a neutral, generally applicable law. It would also recognize that the burdens that GBW is facing here—the unavailability of R-3 land, potential investment losses if the property is not rezoned—are no different from those that would face any landowner in the City.

If a different sort of review is what Congress intended when it enacted RLUIPA, then RLUIPA is unconstitutional, because it exceeds Congress' authority under Section 5 of the Fourteenth Amendment, and amounts to an establishment of religion by exempting religious activities from regulations otherwise applicable to secular or non-religious uses and users. The City,

[125] *Westchester Day School, supra* 386 F3d at 189.

however, submits that so long as the Court reads RLUIPA consistently with the case law addressing and interpreting the judicially fashioned terms of art used by Congress, the City's denial of rezoning withstands review under RLUIPA.

The decision of the lower courts that the City was required to pass legislation to allow GBW's apartment use in the heart of a single-family subdivision should be reversed by this Court. This Court should find that RLUIPA does not apply because GBW's request for an ordinance amendment did not result in an individualized assessment of its proposed use by the City. If the Court finds that the City's consideration of that legislative amendment was an individualized assessment and RLUIPA does apply, then it should reverse the trial court's grant of summary disposition in favor of GBW on the substantial burden issue. The housing proposal at issue was not a religious exercise, and even if it is found to be one the City's application of its facially-neutral single-family regulations did not burden GBW any more than they would burden a non-religious use. At the very least, the City was entitled to a trial on the issue.

And even if the Court finds that the regulations did substantially burden GBW's religious exercise, the Court should then find that the City has a compelling governmental interest in protecting the neighborhood at tissue, and that it chose the least restrictive means of doing so, since the only action being requested of it was the rezoning. The lower courts' conclusions to the contrary should therefore be reversed.

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